IN THE MISSOURI SUPREME COURT
EN BANC

STATE EX REL. KENNETH BAUMRUK,	)	
	)	
RELATOR,	)	
	)	
VS.	)	NO. SC86040
	)	
THE HON. MARK SEIGEL,	)	
	)	
RESPONDENT.	)	

ON PRELIMINARY WRIT OF PROHIBITION
FROM THE SUPREME COURT OF MISSOURI, EN BANC
TO THE HON. MARK SEIGEL, CIRCUIT JUDGE OF ST. LOUIS COUNTY.
TWENTY-FIRST JUDICIAL CIRCUIT, STATE OF MISSOURI

BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

In *State v. Baumruk*, 85 S.W.3d 644 (Mo.banc 2002), this Court reversed the judgment in relator Kenneth Baumruk's underlying criminal case and remanded to the circuit court "with instruction" to grant relator's request for "change of venue." *Id*. at 651.

The Missouri Court of Appeals, Eastern District, denied relator's petition for writ of prohibition on May 24, 2004. On June 4, 2004, relator filed in this Court a petition for a writ of prohibition precluding respondent, the Honorable Mark Seigel, from presiding over an imminent competency hearing and pending trial in relator's underlying criminal case. On June 7, 2004, this Court ordered respondent to file suggestions in opposition. This Court issued a Preliminary Writ of Prohibition on June 22, 2004. The Court has jurisdiction of this matter under Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

1992-1998

On May 5, 1992, at a hearing in Kenneth and Mary Baumruk's dissolution of marriage proceeding in Division 38 of the St. Louis County Circuit Court, relator pulled a gun from his briefcase and shot his wife, Mary, in the neck. *State v. Baumruk*, 85 S.W.3d 644, 646 (Mo.banc 2002). Relator then shot Mary's attorney in the chest and his own attorney in the chest and back. *Id*. at 646-47. Relator shot his wife again, this time in the head, and fired at Judge Hais who was fleeing the courtroom through a door behind the bench. *Id*. at 647.

Reaching the hallway, relator encountered bailiff Fred Nicolay who was securing the safety of a clerk and two attorneys by locking them in the chambers of another judge. *Id*. Relator shot Nicolay in the shoulder, shot at a police officer, and wounded a security officer. *Id*. Nine police bullets, two to relator's head, stopped the rampage. *Id*.

Relator's first criminal case, filed in 1993, was sent to Macon County on change of venue where a circuit judge found relator incompetent to proceed and committed him to the department of mental health. *Id*. In a guardianship proceeding instituted by the department of mental health, a jury determined relator did not need a guardian. *Id*. *citing State ex rel. Baumruk v. Belt*, 964 S.W.2d 443, 443-444 (Mo. banc

1998). Relator's first criminal case ended when the trial court, as ordered by this Court, dismissed the charges. *Id*. In 1998, the state recommenced prosecution of relator by filing an 18-count indictment in St. Louis County (RespEx-1).[1]

In the interim between the dismissal of the first criminal case in

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[1] In this brief, relator will cite to the record in the instant proceeding as follows: Exhibits accompanying relator's Petition will be cited DefEx- ; Exhibits accompanying Respondent's Suggestions in Opposition will be cited RespEx- ; Appendix to relator's brief will be cited A__.

To ensure there is a complete and full record before this Court, by separately filed motion, relator is asking the Court to 1) judicially notice the record in his direct appeal from the judgment in his underlying criminal case, and 2) grant relator leave to supplement the record in this writ proceeding with certified copies of the minute entries in the underlying criminal case subsequent to the October 2002 remand from this Court in *State v. Baumruk*, 85 S.W.3d 644 (Mo.banc 2002).

In this brief relator cites to the direct appeal record as follows: Trial Transcript – Tr; Legal File – LF; Supplemental Legal File – SLF. Relator cites the proposed Supplement to the Record in this Writ proceeding as SuppWritRec.

1993 and the reinstitution of charges in 1998, relator was named in several civil suits filed in St. Louis County (see Supplemental Legal File Volumes I-IV). Among these was a 6-count suit filed August 12, 1992, by bailiff Nicolay docketed as Nicolay v. Baumruk, St. Louis County Cause No. 641138 (A30-34; SLF 390-94)[2].

Nicolay's pleadings alleged alternate theories of liability: Count I alleged relator acted with "carelessness and negligence" in firing his gun, not aiming at or intending to shoot Nicolay, but nonetheless "caused damage..." (SLF 390-91). Nicolay alleged he sustained damages of $12,000 in lost wages, would lose further earnings and wages in the future, had incurred medical expenses of $8,000 and would incur further medical expenses in the future (SLF 391).

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[2] Count VI, alleging in the alternative that relator intentionally fired his gun in Nicolay's vicinity but did not intend "to harm [Nicolay] in any way, or in the alternative, that [relator] was suffering from mental aberrations to such an extent that [relator] did not know and comprehend his actions" and consequently "waved and flourished" his gun "negligently and carelessly" and thus "shot and injured [Nicolay]" was dismissed in November 1992 (SLF 421).

Count II incorporated Count I by reference and added a claim that relator's careless and negligent shooting had "negligently and carelessly" inflicted emotional distress" on Nicolay (SLF 391-92).

In Count III, Nicolay "adopt[ed] and reallege[d]" everything in Counts I and II and alleged, "in the alternative," that relator "intentionally and maliciously aimed at" Nicolay intending to shoot him and did in fact wound him causing damages previously described (SLF 392).

Count IV "adopt[ed] and reallege[d]" everything in Count III (SLF 393). Nicolay also alleged relator's "intentional shooting of [Nicolay] was conduct that was extreme and outrageous and was therefore an intentional infliction of emotional distress upon" him (SLF 393).

In Count V, Nicolay "adopt[ed] and reallege[d]" everything in Counts III and IV; he also alleged that relator's conduct "was extreme, outrageous, intentional and reflected a reckless disregard to the rights of others, all entitling [Nicolay] to punitive damages..." (SLF 393).

On March 3, 1995, the parties agreed, "the decision of Judge Belt on [relator's] competency to stand trial in the criminal proceeding" would be "binding" in *Nicolay v. Baumruk* (SLF 451). On December 15, 1995, the cause was assigned to Division 3 and Judge Seigel (SLF 452).

On or about February 16, 1996, State Farm Fire and Casualty Company (hereinafter, State Farm), filed motions to intervene and to

stay the proceedings (SLF 387, 458-461). In these motions, State Farm asserted it "had a policy of homeowners insurance issued to Kenneth Baumruk" and "ha[d] been called upon to provide coverage and a defense for Kenneth Baumruk in [*Nicolay v. Baumruk*]," that it had "filed a declaratory judgment action seeking a declaration that there is no coverage under its policy for any liability Baumruk might have," and wished to intervene solely to stay the proceeding until the declaratory judgment action was decided (SLF 458-59). State Farm argued that the resolution of the declaratory judgment suit would "allow the parties to [*Nicolay v. Baumruk*] to make informed decisions about continuing this litigation or settling the matter" (SLF 459, 460). Judge Seigel denied State Farms' motions on March 8, 1996 (SLF 462).

On April 19, 1996, Judge Seigel granted relator's attorneys' motion for appointment of a "Defendant Ad Litem" under Rule 52.13(b) on the grounds that relator had been found incompetent and appointed attorney Martin Barnholtz as Defendant Ad Litem (SLF 463-75).

On June 24, 1996, relator's attorneys moved for leave to withdraw on the grounds that they had been retained by State Farm "to defend" relator in *Nicolay v. Baumruk* "pending the resolution of the Declaratory Judgment action which was also pending in the Circuit Court of St. Louis County" (SLF 477). Relator's attorneys stated that because "the

Advisory Jury found that [relator] intentionally shot Fred Nicolay and concluded that there was no insurance coverage under [State Farm's] policy and a judgment in the Declaratory Judgment action was entered accordingly" State Farm had instructed relator's attorneys to withdraw from *Nicolay v. Baumruk* (SLF 477-78). Relator's attorneys stated, "Since there is no applicable insurance coverage under [State Farm's] insurance policy, it would be a conflict of interests for defense counsel to continue handling the defense of this case on behalf of [relator]."

Attached to the motion for leave to withdraw was "Defendant's Exhibit A" – a letter relator's attorneys had written to relator, who had recently been declared incompetent, advising him to obtain new counsel because they were withdrawing (SLF 480-81). On July 1, 1996, the lawyer appointed to serve as Defendant ad Litem wrote to relator, who had been adjudicated incompetent, advising him that State Farm did not have to defend him, and he should "immediately retain an attorney" (SLF 482). In this letter and a second letter dated September 13, 1996, the lawyer appointed to serve as Defendant ad Litem advised relator, ""If you do not defend this matter, I'm confident the Judge will enter a monetary judgment against you…" (SLF 482, 483). Copies of both letters were filed with Judge Seigel (SLF 482-83).

The record does not reflect that Judge Seigel ever ruled on relator's

attorneys' motion for leave to withdraw.

On November 1, 1996, a jury being waived, Judge Seigel tried *Nicolay v. Baumruk* (DefEx13: E55-77). First, the parties stipulated "Fred Nicolay was shot by [relator] on May 5, 1992 (DefEx-13: E58).

Next, Mr. Nicolay's counsel stated:

> With that representation, Judge, I'd also like the Court to take judicial notice of a companion case on file in this court, it was tried June of this year, Cause Number 674810, State Farm Fire and Casualty Company versus Kenneth Baumruk, et al, jury verdict was that it was an intentional shooting and concluded there was no insurance coverage and by the doctrine of collateral estoppel and res judicata that has been decided for us.

(DefEx-13: E58-59). Judge Seigel did not disagree and took judicial notice of the case (DefEx-13: E59).

Fred Nicolay testified he had incurred a total of $9, 772.95 in medical bills as a result of the injuries caused by the shooting, had not received any medical treatment for about the past year, and had no further medical treatment scheduled (DefEx-13: E62-63, E68). He lost $2,092.00 in wages as a result of his injuries (DefEx-13: E67). Mr.

Nicolay's testimony did not touch on the circumstances of the shooting or how he got shot (DefEx-13).

At the conclusion of evidence, Judge Seigel ruled:

> Let record reflect that upon evidence adduced the Court is going to render a judgment in favor of Plaintiff, Fred C. Nicolay and against the Defendant, Kenneth Baumruk in the amount of – Let record reflect, upon evidence adduced, the Court [is] going to render a judgment on Count III for actual damages in the amount of $75,000, and the Court is – feels further that the aggravating circumstances – that the defendant's conduct was so outrageous, extremely intentional and certainly reflects reckless disregard to the rights of others entitling the plaintiff an award of punitive damages in the amount of $25,000.00. Cost will be assessed against the defendant.

(DefEx-13: E76-77; DefEx-15: E78).

1998-2002

By indictment filed March 30, 1998, the state reinitiated prosecution of relator for one count of murder, eight counts of first degree assault, and nine counts of armed criminal action (StEx-1).

By motion titled "Application for Change of Judge," relator timely moved for "both a change of judge and venue ... pursuant to Rule

32.08." (DefEx-8: E32-E37). On April 24, 1998, the trial court announced it had received relator's "application for change of judge and venue pursuant to Rule 32.08..." and "[p]ursuant to Rule 32.08(c)" granted a change of judge; the case was sent to respondent in Division 3. (DefEx-10: E42). Relator's application for a change of venue was denied. *Baumruk*, 85 S.W.2d 644, 647.

Relator sought a change of judge for cause on August 2, 1999 (DefEx-18: E85-88). As grounds, relator asserted that the record in *Nicolay v. Baumruk* – including respondent's assessment of actual damages of $75,000, punitive damages of $25,000, and respondent's other actions, judgments, and decisions in that case – showed respondent had prejudged relator's actions and "either cannot be impartial or his impartiality will reasonably be questioned" (DefEx-18: E87-86). On December 10, 1999, a different circuit judge heard and denied relator's motion for change of judge for cause (DefEx-22: E93-E125). Relator unsuccessfully petitioned both the Eastern District Court of Appeals and this Court for a writ prohibiting respondent from presiding at relator's criminal trial (DefEx's-25-29).

Ultimately, with respondent presiding at trial, a jury found relator guilty of first degree murder (LF 1008). At penalty phase, respondent instructed the jury on ten aggravating circumstances including:

"3. Whether the murder of Mary Baumruk was committed while the defendant was engaged in the attempted commission of another unlawful homicide of Fred Nicolay...

9. Whether the defendant by his act of murdering Mary Baumruk knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person...,

10. Whether the murder of Mary Baumruk involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman... [in that] the defendant killed Mary Baumruk as a part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life"

(LF 1016-20). The jury found all ten aggravating circumstances submitted and assessed punishment at death (LF 1029).

Relator appealed, and this Court reversed "with directions to the trial court to grant [relator's] motion for change of venue." *Baumruk*, 85 S.W3d at 646.

2002 to Present

On October 30, 2002, this Court's order remanding the case for a change of venue was filed and the case was sent to Judge Seigel

(SuppWritRec 1). Over the next several months respondent proceeded to set "scheduling conference[s]," and the defense arranged for relator to be examined for purposes of evaluating his competency to stand trial (SuppWritRec 1).

During "several in chambers conferences," respondent discussed with the attorneys where the case should be sent; possible venues discussed included Jackson County and St. Charles County (RespEx-10: 5, 23-24).

On June 16, 2003, relator filed a "Notice of Intent to Rely on Chapter 552.020" and respondent, on his own motion, ordered an examination of relator pursuant to Section 552.020 (RespEx-6; SuppWritRec 1). The minute entries reflect that between June, 2003, and the end of October, 2003, psychiatric examinations and evaluations of relator took place, and reports concerning the same were filed (SuppWritRec 1).

On February 5, 2004, a competency hearing was set for May 17th (SuppWritRec 2). On May 5, 2004, relator filed, and respondent denied, a "Motion for Change of Judge or in the Alternative For the Judge to Recuse Himself" (DefEx's 2 & 3: E5-13).

Also on May 5th, relator filed a "Rule 32.08 Motion for Recusal of Judge" (DefEx-1: E1-E4). A hearing on this motion was held on May 14, 2004 (RespEx-10; SuppWritRec 3).

In his Rule 32.08 Motion, and at the May 14th hearing, relator argued that Rule 32.08(e) specifies only two circumstances in which a "newly assigned judge" shall remain on a case: when a change of venue is denied or where the change of venue is to another county in the same circuit (RespEx-10: 2-4; DefEx-1: E3). Neither circumstance being present, relator argued, respondent could not remain on the case (DefEx-1; RespEx-10: 18).

On May 14, 2004, respondent denied relator's Rule 32.08 Motion and announced he was sending the case to St. Charles County and would try it there (RespEx-10: 25; DefEx-4: E14).

On May 17, 2004, relator filed a petition asking the Court of Appeals, Eastern District, to issue a writ prohibiting respondent from presiding at relator's competency hearing and trial (DefEx-5: E15-E29). The Eastern District denied relator's petition on May 24, 2004 (DefEx-6: E30). On June 4, 2004, relator petitioned this Court to issue a writ prohibiting Judge Seigel from presiding over relator's competency hearing and trial. On June 22, 2004, this Court issued a preliminary writ of prohibition.

To avoid repetition, additional facts, as necessary, will be presented in the argument.

POINTS RELIED ON

Point One

Relator is entitled to a writ of prohibition ordering respondent to take no further action and to cease participating as judge in the underlying criminal case, *State v. Baumruk*, because respondent lacks jurisdiction to continue to proceed in that case in that 1) this Court's mandate to the circuit court in *State v. Baumruk*, 85 S.W.3d 644 (Mo.banc 2002), was – only and specifically - to grant the change of venue, 2) there is no authority under Missouri's Constitution, statutes, or Rules for a judge to transfer himself to another circuit when venue is changed to a new circuit, and 3) once a case has been transferred to a different circuit under a change of venue, the "receiving" circuit case has "jurisdiction to hear and determine" the case as if the case had originated there, and the "sending" circuit and judges no longer have jurisdiction.

State v. Baumruk, 85 S.W.3d 644 (Mo.banc 2002);

State ex rel. Fowler v. Calvird, 93 S.W.2d 1106 (K.C.App. 1936);

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo.banc 2001);

State ex rel. Leigh v. Dierker, 974 S.W.2d 505 (Mo.banc1998);

Mo. Const., Art. V, § 6;

Mo. Const., Art. V, § 15.1;

Missouri Supreme Court Rule 32.08(e)

Missouri Supreme Court Rule 51.14.

Point Two

Relator is entitled to a writ ordering respondent, Judge Seigel, to take no further action and cease participating in the underlying cause, *State v. Baumruk*, because respondent lacks jurisdiction in that the record in a civil case tried by respondent, *Nicolay v. Baumruk*, St. Louis County No. 641138, reveals respondent's adjudication of claims and his findings of fact – going beyond the record in that case and involving issues and matters likely to arise in the underlying criminal case – disqualified him by demonstrating he cannot serve fairly and impartially in *State v. Baumruk* and it is reasonable to believe he cannot serve fairly and impartially in *State v. Baumruk*.

State v. Lovelady, 691 S.W.2d 364 (Mo.App.W.D. 1985);

State ex rel. McCulloch v. Drumm, 984 S.W.2d 555 (Mo.App.E.D. 1999);

State ex rel. Wesolich v. Goeke, 794 S.W.2d 692 (Mo.App.E.D. 1990);

Missouri Supreme Court Rule 2, Canon 3.E(1);

ARGUMENT

As to Point One: Relator is entitled to a writ of prohibition ordering respondent to take no further action and to cease participating as judge in the underlying criminal case, *State v. Baumruk*, because respondent lacks jurisdiction to continue to proceed in that case in that 1) this Court's mandate to the circuit court in *State v. Baumruk*, 85 S.W.3d 644 (Mo.banc 2002), was – only and specifically - to grant the change of venue, 2) there is no authority under Missouri's Constitution, statutes, or Rules for a judge to transfer himself to another circuit when venue is changed to a new circuit, and 3) once a case has been transferred to a different circuit under a change of venue, the "receiving" circuit case has "jurisdiction to hear and determine" the case as if the case had originated there, and the "sending" circuit and judges no longer have jurisdiction.

Prohibition is the appropriate remedy to prevent a court when a court lacks jurisdiction.

A writ of prohibition "is to prevent or control judicial or quasi-judicial action." *State ex rel. Sommer v. Calcaterra*, 247 S.W.2d 728,

729 (Mo.banc 1952). "[A]lthough ordinarily prohibition is preventative rather than corrective, and issues to restrain the commission of a future act and not to undo an act already performed, yet prohibition is available where a judicial body is proceeding without jurisdiction, and some part of its action remains to be performed." *Id*. at 730. *See also State ex rel. Schnuck Markets, Inc. v. Koehr*, 859 S.W.2d 696, 698 (Mo. banc 1993) (Upon entering "a valid order transferring venue," judge in sending circuit "had no jurisdiction to proceed in the case other than to effect the transfer").

Prohibition will lie where a party cannot obtain "relief from the judgment entered against them, by appeal or other adequate remedy at law." *State ex rel. Fowler v. Calvird*, 93 S.W.2d 1106, 1109 (K.C.App. 1936). Because, as in *Fowler v. Calvird*, relator cannot take an interlocutory appeal from respondent's ruling and order, and because respondent "had no jurisdiction" to render his ruling and order, prohibition is proper. *Id*.

Although prohibition is discretionary, it "may be appropriate to prevent unnecessary, inconvenient, and expensive litigation." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo.banc 2001) (citation omitted). Thus, even if, assuming for the sake of argument, relator could eventually appeal from respondent's rulings and orders,

prohibition is appropriate to avoid the expense of a trial and ultimate reversal based on respondent's lack of jurisdiction to proceed.

This Court's mandate governs the trial court on remand.

All respondent had to do was comply with the mandate of this Court. That mandate directed respondent to order a change of venue. In fact, this Court twice directed respondent to do *just* that:

> The Court concludes that Baumruk, who had previously been found incompetent to stand trial, can be later indicted for the same offenses. But he should be tried in a venue other than St. Louis County. The trial court's refusal to grant Baumruk's motion for change of venue was an abuse of discretion in this unique case. Accordingly, the judgment is reversed, and the case is remanded with directions to the trial court to grant Baumruk's motion for change of venue.

State v. Baumruk, 85 S.W.3d 644, 646 (Mo.banc 2002).

> Baumruk can be tried on the charges for which he has again been indicted. But he should not be tried where those shootings occurred.
>
> The judgment is reversed, and the case is remanded with instruction to the trial court to grant the change of venue.

Id. at 651.

An appellate court's mandate governs. Respondent had no authority or jurisdiction to do anything other than what the mandate directed.

> On remand, the trial court was required to follow the directions in the opinion of this court and its mandate. [Citation omitted.] Action to be taken upon remand of a case from an appellate court is communicated by that court's mandate. [Citation omitted.] The appellate court's opinion is a part of the mandate. [Citation omitted.] A trial court has no authority to do other than as directed by an opinion and mandate upon remand. [Citation omitted.] If it has done otherwise, any proceedings it took that were inconsistent with the opinion and mandate in the initial appeal are null and void. [Citation omitted.]

State ex rel. Yerington v. LePage, 139 S.W.3d 219, 221 (Mo.App.S.D. 2004).

Neither the mandate nor the opinion in *State v. Baumruk, supra*, directed or instructed respondent to follow the case to St. Charles or to preside at any hearings or other proceedings. Respondent's actions not authorized by the mandate exceeded respondent's jurisdiction.

Under Missouri law, once respondent ordered venue changed to another circuit, respondent's jurisdiction ended.

Missouri's Constitution authorizes transfer of a judge from one circuit to another in two instances. First, the Missouri "Supreme Court may make temporary transfers of judicial personnel from one court or district to another as the administration of justice requires, and may establish rules with respect thereto." Mo.Const., Art. V, § 6. The second provision for transfer of a judge allows a judge to "temporarily sit" in another circuit when *invited*: "Any circuit or associate judge may temporarily sit in any other circuit at the request of a judge thereof." Mo.Const., Art. V, § 15.1.

The Missouri Supreme Court Criminal Rules set out the procedures to be followed in changing venue. Nowhere do the Rules provide for a circuit judge to follow a case on a change of venue from the judge's home circuit to another circuit.

Rule 32.08 is applicable in this case because relator filed for both a change of judge and a change of venue in 1998 (DefEx-8: E32-E37). Only the change of judge was granted, and the "newly assigned judge" was – and is – respondent (DefEx-10: E42; LF 1, 82, 88).

Under Rule 32.08(e), there are two circumstances in which the "newly assigned judge" remains on a case: where a change of venue is denied, or where venue is changed to a different county but remains within the circuit. Neither circumstance exists in the underlying case.

This is not a case where a change of venue has been denied: this Court ordered the case remanded for a change of venue and respondent eventually ordered venue changed (RespEx-10 at 25). Nor did this case remain in St. Louis County which comprises, in its entirety, the twenty-first judicial circuit. Venue was changed to St. Charles County comprising the eleventh judicial circuit on May 14, 2004.

Although Rule 32.08(e) does not specifically state that that when venue is changed to another circuit, a judge from the receiving circuit shall preside, Rule 51.14, the corresponding civil rule, so provides:

> Following a change of venue, for any reason, to a county outside the circuit from which venue was changed, the case shall be handled by a judge regularly appointed to hear cases in the new circuit, unless a judge is otherwise assigned to hear the case as authorized by article V, §§ 6 or 15 of the constitution.

"The rules of construction employed when interpreting Supreme Court Rules are identical to those employed when construing legislative enactments." *Felton v. Hulser*, 957 S.W.2d 394, 397 (Mo.App.W.D. 1997) (citation omitted). "The primary rule of statutory construction is to ascertain the intent from the language used and to give effect to that intent if possible." *Id*. In interpreting court rules, the appellate courts of this state have considered interpretations and constructions given to

comparable civil and criminal rules for guidance. *See, e.g., Hancock v. Shook*, 100 S.W.3d 786, 796-97 (Mo. banc 2003) (relying on *State v. Whitfield*, 837 S.W.2d 503, 507 (Mo.banc 1992)); *State ex rel. Davis v. Lewis*, 893 S.W.2d 817, 819 (Mo.banc 1995); *State v. Ganaway*, 556 S.W.2d 67, 69-70 (Mo.App.St.L.D. 1977).

Thus it is helpful to consider Rule 51.14 which makes express what is implied in Rule 32.08(e) and gives guidance to interpreting that very similar rule. Rule 51.14 is not inconsistent with Rule 32.08(e) and there is no reason to treat a criminal case differently than a civil case. Rule 32.08(e) should be interpreted and construed consistently with what is expressly stated in Rule 51.14.

Finally, the opinions of Missouri's appellate courts have made it very clear that once venue is changed, and a case is sent to a different circuit, the sending judge loses jurisdiction. *See, e.g., State ex rel. Leigh v. Dierker*, 974 S.W.2d 505, 506 (Mo.banc1998); *State ex rel. Schnuck Markets, Inc. v. Koehr, supra*. As succinctly stated by the Kansas City Court of Appeals in 1936 in reviewing the action of the circuit judge of Henry County who, after transferring venue, attempted to enter a judgment for costs in the case:

> Upon such change of venue, such cause and the subject-matter thereof, together with all the parties thereto and all matters

> incident thereto, passed to the jurisdiction of the circuit court of Johnson county. [Citation omitted.] Not a shred of jurisdiction over the cause or any of its incidents remained in the jurisdiction of the circuit court of Henry county or under the jurisdiction of the respondent judge.

State ex rel. Fowler v. Calvird, supra, 93 S.W.2d at 1108.

Respondent may not continue to proceed on the underlying criminal case. Relator is entitled to a writ prohibiting respondent from so doing.

As to Point Two: Relator is entitled to a writ ordering respondent, Judge Seigel, to take no further action and cease participating in the underlying cause, *State v. Baumruk*, because respondent lacks jurisdiction in that the record in a civil case tried by respondent, *Nicolay v. Baumruk*, St. Louis County No. 641138, reveals respondent's adjudication of claims and his findings of fact – going beyond the record in that case and involving issues and matters likely to arise in the underlying criminal case –disqualified him by demonstrating he cannot serve fairly and impartially in *State v. Baumruk* and it is reasonable to believe he cannot serve fairly and impartially in *State v. Baumruk.*

> Prohibition is an independent proceeding to correct or prevent judicial proceedings that lack jurisdiction. If a judge either fails to disqualify himself upon a proper application or denies the application without a proper hearing, he is without jurisdiction and prohibition lies.

*State ex rel. McCulloch v. Drumm***,** 984 S.W.2d 555, 556 (Mo.App. E.D. 1999) *citing State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 694

(Mo.App.E.D. 1990).

Prohibition is appropriate here, because the record in *Nicolay v. Baumruk* discloses that respondent was biased against relator, could not be fair and impartial, and was therefore disqualified. Accordingly, respondent lacks jurisdiction and relator is entitled to a writ prohibiting respondent from proceedings.

Respondent's findings and judgments Nicolay are, at best, disturbing. Respondent had before him the parties' stipulation that relator intentionally shot Nicolay (DefEx-13: E58). But that was the extent of the evidence concerning relator's intentions and animus towards Nicolay. There was no evidence presented at the trial concerning the circumstances of relator's shooting of Nicolay – the stipulation was limited to the shooting being "intentional." Nicolay's testimony concerned his injury and monetary damages (DefEx-13: E58-E71). Nicolay did not testify about being shot.

Nothing in the record explains or supports respondent's finding that relator's conduct was "so outrageous, extremely intentional and certainly reflects reckless disregard to the rights of others entitling" Mr. Nicolay to punitive damages of $25,000 (DefEx-13: E75-76). There was no evidence in the record before respondent in the Nicolay case to explain why respondent found relator's conduct "outrageous..."

Respondent's reasons for his decisions remain obscure. What is apparent is that respondent made findings, decisions, and judgments about relator's conduct that lacked support in the record. Perhaps respondent was relying on what he had learned about the shooting from sources outside that courtroom proceeding, or perhaps respondent simply assumed relator acted intentionally. Either way, respondent's treatment of the issues in *Nicolay v. Baumruk* demonstrates he cannot serve fairly and impartially in *State v. Baumruk*.

Based on the record of the previous criminal trial, it is fair to anticipate that the state will ask the judge who presides at the retrial in relator's criminal case to submit the following aggravating circumstances to the jury:

> "3. Whether the murder of Mary Baumruk was committed while the defendant was engaged in the attempted commission of another unlawful homicide of Fred Nicolay...
>
> 9. Whether the defendant by his act of murdering Mary Baumruk knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person...,
>
> 10. Whether the murder of Mary Baumruk involved

> depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman... [in that] the defendant killed Mary Baumruk as a part of defendant's plan to kill more than one person and thereby exhibited a callous disregard for the sanctity of all human life"

(LF 1016-20).

The judge presiding at relator's criminal trial will need to decide if the evidence warrants these aggravating circumstances. The language used by respondent in *Nicolay v. Baumruk* in assessing punitive damages closely resembles the language of the third aggravating circumstance quoted above. Respondent's findings suggest he has prejudged the submissibility of the first two aggravating circumstances.

Based on the record in *Nicolay v. Baumruk*, it is reasonable to believe that although respondent had heard no evidence in the underlying criminal case at the time he presided in *Nicolay*, he had already made a decision that would affect his ability to serve fairly and impartially in the criminal case. At the very least, relator has demonstrated that a reasonable person would question whether respondent could be fair and impartial.

> The law is a very jealous of the notion of an impartial arbiter. It is scarcely less important than his actual impartiality that

> the parties and public have confidence in the impartiality of the arbiter. Where a judge's freedom from bias or prejudgment of an issue is called into question, the inquiry is no longer whether he actually is prejudiced; the inquiry is whether an onlooker might on the basis of objective facts reasonably question whether he was so.

State v. Lovelady, 691 S.W.2d 364, 365 (Mo.App.W.D. 1985).

The Code of Judicial Conduct requires a judge to recuse himself where "the judge's impartiality might reasonably be questioned..." Rule 2, Canon 3E(1). Respondent should have recused himself: either because he could not, in fact, fairly and impartially preside at relator's trial or because his "impartiality might reasonably be questioned..." Because he has not done so, although disqualified, relator is entitled to a writ prohibiting respondent from continuing to proceed in the underlying criminal case.

CONCLUSION

For the foregoing reasons, relator is entitled to a writ of prohibition ordering respondent not to continue to proceed in relator's underlying criminal case.

Respectfully submitted,

_____
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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's 84.06(b). The brief comprises 4,552 words according to Microsoft word count.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, first-class postage prepaid, this ____ day of _____, 20___, to counsel for respondent, Mr. John R. Lasater, Assistant Prosecuting Attorney, 100 South Central, St. Louis, Missouri, 63105, (314) 615-2600, and an email containing a copy of said brief was sent to aforesaid counsel for respondent at JLasater@stlouisco.com, and a true and correct copy was mailed, first-class postage prepaid, to respondent, the Hon. Mark Seigel, St. Louis County Courts Building, Division 3, 7900 Carondelet, Clayton, Missouri 63105 (314) 615-1503.

_____

Attorney for Relator